Supreme Court U.S.
FILED
MAY 16 2002
OFFICE OF THE CLERK

No. 01-1602

IN THE

Supreme Court of the United States

NEW YORK STOCK EXCHANGE, INC.,

Petitioner,

—v.—

MFS SECURITIES CORPORATION and MARCO SAVARESE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DOMINIC F. AMOROSA
95 Worth Street
New York, New York 10013
(212) 406-7000

Attorney for Respondents

15 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court overrule its holding in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) that, because the New York Stock Exchange ("NYSE") occupies a dominate position in the securities trading markers, its imposition of a financially devastating group boycott, without affording the victim of that boycott notice and an opportunity to be heard, constitutes a per se violation of the Sherman Act?

2. In view of the Complaint's allegations that the NYSE violated its statutorily imposed disciplinary rules, over which the SEC has jurisdiction, in automatically terminating Respondent MFS Security Corp's ("MFS") membership in the NYSE without affording MFS a hearing and notice to be heard, was it improper for the Court of Appeals, relying upon *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), to refer Petitioner's allegations to the SEC for findings?

PARTIES TO THE PROCEEDING

Respondent MFS is a New York Corporation owned entirely by Respondent Marco Savarese.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
FACTUAL BACKGROUND	3
PROCEDURAL HISTORY	4
REASONS FOR DENYING THE PETITION	5
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: PAGE

Broadcast Music Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1 (1979) 6

FTC v. Indiana Fed. of Dentists, 476 U.S. 447 (1986) 9

Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959) 6

Northwest Pacific R. Co. v. United States, 356 U.S. 1 (1958) 6

Northwest Wholesalers Stationers, Inc. v. Pacific Stationers and Printing Co., 472 U.S. 284 (1985) 2, 6-8

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) 6

Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) ..... i, 9

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) ..... *passim*

United States v. General Motors Corp., 384 U.S. 127 (1966) 6

STATEMENT OF THE CASE

Respondents, MFS and Marco Savarese, respectfully submit this opposition to the Petition for a writ of certiorari by the NYSE seeking review of a judgment of the United States Court of Appeals for the Second Circuit, which reversed a District Court order dismissing Respondents' Sherman Act anti-trust claim against the NYSE. The claim alleged that the NYSE "automatically terminated" Respondent MFS' membership at the NYSE, and imposed a group boycott against it, without notice to MFS and in violation of the NYSE's own disciplinary rules and federal statutes.

The District Court dismissed the anti-trust claim on the basis that it did not allege per se anti-trust liability and, therefore, was required to satisfy the "rule of reason" anti-trust analysis. According to the District Court, under the rule of reason test, because the Complaint did not allege harm to competition in general, it was defective. The Second Circuit reversed the District Court on this issue, evidently relying upon *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). In *Silver*, this Court held that the NYSE's imposition of a group boycott against a non-member, which devastated the non-member's business, without providing that non-member with notice or an opportunity to be heard, constituted a per se violation of the Sherman Act. The facts of *Silver* are indistinguishable from those alleged in Respondents' Complaint which also seeks to hold the NYSE to per se anti-trust liability. Indeed, because *Silver* held the NYSE liable for a per se violation of the Sherman Act, there was no analysis made in the Court's opinion with respect to allegations of harm to competition in general, as opposed to specific harm to the Plaintiff. The Petition misstates the holding of *Silver*. It argues that *Silver* did not hold the NYSE liable for a per se violation of the

anti-trust laws, but rather held the NYSE liable under the "rule of reason" anti-trust test. The Petition goes on to argue, as Petitioner did in the Second Circuit, that because Respondents' Complaint did not allege harm to competition in general, the rule of reason test required that the Complaint be dismissed. But the Second Circuit was correct to reject Petitioner's argument. *Silver* is clear in holding that the NYSE was per se liable to the non-member for its conduct, without regard to whether competition in general was affected. Indeed, this Court's subsequent decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationers & Printing Co.*, 472 U.S. 284 (1985), in distinguishing *Silver* from the facts there, specifically re-affirmed the holding of *Silver*: "Because the New York Stock Exchange occupied such a dominant position in the securities trading markets that the boycott would devastate the nonmember, the Court [in Silver] concluded that the refusal to deal with the nonmember would amount to a per se violation of Section 1 [of the Sherman Act] unless the Securities Exchange Act provided immunity." *Id.* at 291. Tellingly, in taking the position that *Silver* was not a per se anti-trust case, the Petition ignores the language of this Court in *Northwest Wholesale* which expressly stated to the exact contrary.

The entire premise of the Petition is undermined by its misinterpretation of *Silver* and its suggestion that this Court's prior decisions that "group boycotts" are per se violations of the Sherman Act, (see Petition at 13, n. 12), are no longer good law. In effect the Petition takes the position that even if group boycotts are imposed, there can be no per se anti-trust liability, only liability under the rule of reason test. This position would effectively overrule *Silver*.

Factual Background

In 1997 the SEC and the United States Attorney's Office for the Southern District of New York ("USAO") began an investigation of illegal trading at the NYSE in which the NYSE itself was implicated. The investigation related to whether the NYSE had knowingly permitted its floor brokers to trade illegally for their own accounts by allowing them to share profits from their floor trading with their customers. Thereafter, the SEC filed an administrative action against the NYSE alleging that the NYSE had failed to enforce its own rules relating to these profits sharing arrangements. A District Court in the Southern District of New York agreed with these SEC allegations, finding that the NYSE's effort to enforce the rules of the Securities Exchange Act of 1934 ("The Exchange Act") was "anemic" and its interpretation of the law "makes a mockery" of the language of the Act. (See Appendix D, at 59a-63a).

On February 25, 1998, during the time that the NYSE was under investigation, MFS, an independent floor broker-member organization in good standing with the NYSE since 1980, had its membership automatically terminated by the NYSE without notice and without being afforded an opportunity to be heard in violation of NYSE disciplinary rules and in violation of the Exchange Act. At this time the NYSE imposed a group boycott against MFS by its membership, cut MFS' phone wires with its many customers, who were other members of the NYSE, and terminated MFS' privileges to transact business at the NYSE, which in turn destroyed MFS' business entirely. This illegal conduct, which arbitrarily deprived MFS of the protection of rules of the NYSE requiring notice and an opportunity to be heard, which conduct was also in violation of the Exchange Act, was motivated by an effort by the NYSE to curry favor with

USAO and the SEC which were then investigating MFS along with the NYSE's role in illegal practices on the floor. The purported reason for the automatic termination given by the NYSE was that MFS's two floor brokers had been suspended on February 25, 1998 by the NYSE. According to the NYSE, because MFS's two floor brokers were suspended, MFS automatically lost its membership. The Complaint, however, alleged that this was a subterfuge. NYSE rules expressly barred this kind of automatic termination. Moreover, the NYSE denied MFS the right to replace immediately these suspended brokers with others who were members in good standing of the NYSE. The Complaint alleged that this is the first time in the history of the NYSE that a member had its trading privileges terminated in this unilateral fashion, without notice under the rules and an opportunity to be heard. (See Appendix D, at 63a-71a).

Procedural History

The Compliant was filed in District Court on July 27, 2000. It alleged two causes of action, the Sherman Act claim and a claim for breach of contract. The Petitioner filed a motion with the District Court seeking dismissal of both causes of action. The Petitioner alleged four grounds for dismissal of the anti-trust claim. First, it argued that it had absolute immunity from because of its status as a self-regulatory entity. Second, it argued that the anti-trust laws had been impliedly repealed by the Securities Exchange Act. Third, it argued that the anti-trust claim did not allege a per se violation of the Sherman Act, and, accordingly, was required to allege under the rule of reason anti-trust doctrine facts showing an unreasonable restraint on competition in general, and because it did not do so, it failed this test and had to be dismissed. Lastly, the Petitioner argued that the Com-

plaint did not allege an anti-trust conspiracy involving anyone other than NYSE employees, and was therefore defective on that basis also. With respect to the contract claim, Petitioner argued that it had absolute immunity.

The District Court agreed with Petitioner on the "rule of reason" issue and dismissed the anti-trust claim. The District Court did not rule on the other arguments expressly. It also dismissed the contract claim finding that the NYSE had absolute immunity on this claim.

In the Second Circuit, Petitioner re-asserted all of the arguments it made in the District Court on the anti-trust claim, including the three on which the District Court did not expressly rule. In reversing the District Court, and re-instituting the anti-trust claim, the Second Circuit rejected all four of Petitioner's arguments. The Second Circuit ordered that the allegations of the Complaint be presented for administrative review to the SEC under the principle of Primary Jurisdiction, as the Court found that the SEC had jurisdiction over the allegations that NYSE Rules and federal statutes had been violated. Once this SEC review is completed, the anti-trust claim will return to District Court and the District Court will have SEC findings to assist it in determining legal and factual issues.

REASONS FOR DENYING THE PETITION

Petitioner seeks certiorari only on the rejection by the Second Circuit of its rule of reason argument, and not the rejection of the other three arguments it made in the Second Circuit as to why the District Court should have been affirmed, which are now the law of this case. Petitioner's attempt to demonstrate a "compelling reason" for this Court to grant a writ of certiorari on even this limited basis is meritless. The whole premise of the Peti-

tion's argument that the Second Circuit improperly failed to apply the rule of reason analysis to the Complaint is based on an erroneous interpretation of the Court's prior anti-trust cases, one of which, *Silver v. New York Stock Exchange, supra*, involved facts almost identical to those alleged here. The Petition even suggests, without the slightest bit of support, that the Court earlier cases on group boycotts and the per se rule, such as *Silver, supra, Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *United States v. General Motors Corp.*, 384 U.S 127 (1966), are no longer good law. (See Petition at 13, n. 12). The Petition argues in effect that the per se rule no longer is a viable anti-trust principle based upon the Court's more recent cases, *e.g.*, *Northwest Wholesale, supra*. The Petition misreads the law.

This Court has long held that "concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of the Sherman Act." See *Silver, supra*; *Klor's Inc. v. Broadway-Hale Stores, Inc., supra*; *United States v. General Motors Corp., supra*; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979). The Court has stated that:

> "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). This language was the basis for the Court's 1963

decision in *Silver* and was designed for the case here. The only issue here should be whether Respondents can prove their allegations underlying their claim of per se liability, not whether, if the allegations are true, it is possible that the NYSE can offer an excuse for what it did, or whether Respondents are required to prove further that competition in general was injured.

The Supreme Court opinion in *Northwest Wholesale, supra*, which explicitly recognized that *Silver* involved a per se violation of the antitrust laws, see *Northwest Wholesale, supra*, at 291, also supports the Second Circuit rejection of Petitioner's argument that this is not a per se case. This case involved the expulsion of a member of a wholesale purchasing cooperative without affording the member any procedural means for challenging the expulsion. The Court held that in the circumstances of that case there was no per se violation of the Sherman Act, and that the "rule of reason" analysis should apply. The circumstances included the critical fact, which the Court found distinguished that case from *Silver*, that the cooperative which expelled the complaining member did not possess "market power or unique access to a business element necessary for effective competition." *Id.* at 298. Nor did it possess, as did the NYSE in *Silver*, "market power or exclusive access to an element essential to effective competition." *Id.* at 287. These distinctions were dispositive in the Court's refusal to follow the per se finding in *Silver*, in which the Court found that the NYSE had such "market power or unique access":

> "Because the New York Stock Exchange occupied such a dominant position in the securities trading markets that the boycott would devastate the nonmember, the [*Silver*] Court concluded that the

> refusal to deal with the non-member would amount to a per se violation of Section 1 . . ." *Id.* at 291.

This is exactly the kind of power which was exercised against Respondent MFS here when the NYSE arbitrarily terminated MFS' membership, cut its phone lines, imposed a group boycott against MFS by its members, and refused to permit MFS to hire a broker to fill the vacancies left when its brokers were suspended. The entire power of the market was in the hands of the NYSE and its members. Once the boycott went into effect, MFS had no ability to compete at all, as its only customers were other members who refused to do business with it. As a result, MFS was destroyed financially. This is the most egregious type of per se violation of the Sherman Act, and it is conclusively presumed to be anticompetitive. As the Court in *Northwest Wholesale* also noted:

> "This per se approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive. Courts can thereby avoid that 'significant costs' in 'business certainty and litigation efficiency' that a full-fledged rule-of-reason inquiry entails. . . . The decision to apply the per se rule turns on 'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive'". *Id* at 289-290.

There is not a single redeeming feature to what the NYSE did to MFS in this case. Its conduct was not only such that it would tend to restrict competition. It was intended to do exactly this by terminating MFS' ability to conduct business at the NYSE. The issue here is whether the restraint on trade—and it certainly cannot be

denied that there was such a restraint—was reasonable. If one accepts, as one must, the allegations of the Complaint as true, one must conclude not only that the restraint here was unreasonable, but that the NYSE's conduct must be conclusively presumed to be anticompetitive. In *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 458 (1986), the Court stated that the per se rule applies to exceptional cases. As the Court found in *Silver*, this is such a case.

Finally, in accordance with the Petition's premise that the Complaint is defective as a matter of law because it does not allege harm to competition in general, the Petition also argues that referral by the Second Circuit to the SEC of MFS' allegations under the doctrine of Primary Jurisdiction was error. This, because even if all of MFS' allegations are correct, that is, that the NYSE violated its own disciplinary rules, and federal statutes, in automatically terminating MFS' membership and imposing a group boycott against it, the Complaint must still be dismiss because it fails to meet the rule of reason test. Because Petitioner's underlying premise is wrong, this argument must fail also. Indeed, the Second Circuit finding that SEC review will materially assist the District Court on remand (Appendix A, at 15a), because the SEC has jurisdiction over many of the allegations of the Complaint, is beyond dispute and in accordance with this Court's decision in *Ricci v. Chicago Mercantile Exchange*, 409 U.S.289, 299 (1973).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a writ of certiorari.

Dated: New York, New York
May 15, 2002

Respectfully submitted,

DOMINIC F. AMOROSA
95 Worth Street
New York, New York 10013
(212) 406-7000

Attorney for Respondents